**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| NATIONWIDE PROGRAMMATIC | ) | WT Docket No. 03-128 |
| AGREEMENT REGARDING THE | ) | |
| SECTION 106 NATIONAL HISTORIC | ) | |
| PRESERVATION ACT REVIEW PROCESS | ) | |
| | ) | |

# COMMENTS OF NEXTEL COMMUNICATIONS, INC.


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## SUMMARY

Facilities-based commercial wireless carriers cannot compete in today's telecommunications marketplace without the reasonable availability of tower sites for the growth and expansion of their network infrastructure. Predictable, streamlined procedures for the construction of cell sites and towers are thus necessary to ensure that all radio-based communications services are able to increase the scope of the geographic territories and their service offerings.

Because of this Commission's keen interest in expanded rural service availability and facilities-based competition, it is ironic that it has proposed a draft Programmatic Agreement that is weighted down with burdensome, lengthy, and unnecessary review procedures that permit state governments, Indian tribes, and "interested third parties" to have a virtually unlimited say in the siting approval process. These new procedures are over and above the normal local government zoning processes -- processes that can oftentimes take over a year to resolve -- that CMRS carriers must go through prior to constructing new facilities. Added federal siting procedures that inject more delay and uncertainty into the process do not advance the public interest.

Additional delay and uncertainty also will have an adverse effect on the Commission's core public safety mission. Wireless carriers have become a crucial link in the Commission's commitment to protect the public safety and welfare of consumers. Nextel is working to meet Commission benchmarks for enhanced 911 service and Nextel provides back-up and interoperable service to many first responders in the public safety community. The close connection between wireless carrier ability to build basic network infrastructure and to provide enhanced emergency response and other public safety services should not be ignored.

Wireless subscribers are no longer content to live with partial coverage, limited service offerings or "dead zones." *Subscribers expect and demand ubiquitous coverage*. The public interest thus requires streamlined and straightforward tower siting procedures that will advance rather than hamper wireless carriers' ability to build out their networks, expand their service area, enhance their coverage and relieve increasing congestion.

Moreover, convoluted and overly burdensome tower siting rules are contrary to the Commission's commitment to provide CMRS carriers with flexibility to develop their service offerings, buildout their networks and serve customers. Typically, the Commission has permitted commercial wireless carriers to build and operate cell sites and towers without any prior approval beyond the initial spectrum licensing process. And the Commission has encouraged CMRS infrastructure investment through market-based competition rather than by strict regulatory oversight. Lengthy, incomprehensible procedures, *e.g*., the list of convoluted *exemptions to the exclusions* to the Section 106 review process contained in Section III.A.5 of the draft Programmatic Agreement, are at odds with the Commission's pro-consumer and pro-competitive deregulatory CMRS policies.

The Programmatic Agreement as it now stands affords layer upon layer of tower siting and placement review to the Commission, state and local governments, Indian tribes and any "interested party." Even more disturbing is the fact that the Programmatic Agreement contains no time limits for such review. The Commission must either reject the Programmatic Agreement as a whole or at the very least modify the provisions that allow for this additional third-party review of CMRS carriers tower siting proposals and which do not inject any time constraints on such review. In particular, the Commission should: (1) streamline and clarify the list of Undertakings that fall within the provisions of the Programmatic Agreement process by

adopting the initial list agreed to by the CMRS industry; (2) do away with the separate and additional Indian tribe *consultation* and approval process; (3) eliminate public participation outside of the traditional zoning process; and (4) adopt limited and specific timeframes for Commission and SHPO/THPO review, including a ***30 day timeframe for review of any proposed Undertaking.***

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**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking seeking comment on the draft Nationwide Programmatic Agreement ("Programmatic Agreement") among the Commission, the Advisory Council on Historic Preservation ("Council"), and the National Conference of State Historic Preservation Officers ("Conference").[1]

## I. INTRODUCTION

Nextel is one of six facilities-based Commercial Mobile Radio Service ("CMRS") providers operating on a nearly nationwide basis. Nextel currently serves over eleven million service subscribers throughout its licensed service territories, and through its arrangements with Nextel Partners, currently offers wireless service in portions of 197 of the top 200 Metropolitan Statistical Areas. The CMRS industry is fiercely competitive, and Nextel is constantly working

[1] NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS, *Notice of Proposed Rulemaking,* WT Docket No. 03-128, FCC 03-125, ¶ 1 (rel. June 9, 2003) ("NPRM").

to improve its service options and the quality of service it offers to its customers. Like other wireless providers that brand and market their wireless services nationwide, Nextel continually looks for new and more efficient ways to increase its footprint and to enhance its existing network infrastructure.

As a facilities-based CMRS carrier that is vitally dependent upon the reasonable availability of tower and antenna sites for the growth and expansion of its wireless services, Nextel has a vested interest in the outcome of this rulemaking proceeding. The Commission's commitment to streamline current tower and antenna siting procedures is commendable. Indeed, predictable, streamlined procedures for the construction of cell sites and towers are necessary to ensure that all CMRS providers are able to expand the geographic areas and the number of customers they serve.

The Commission describes the Programmatic Agreement as intended to tailor and streamline procedures for review of certain Undertakings for communications facilities under the National Historic Preservation Act of 1966 ("NHPA"),[2] as well as dovetail with related revisions of the Commission's Rules. Despite its billing, the Programmatic Agreement, as currently drafted, fails to achieve any streamlining of the current procedures. In fact, the draft presented for public comment adds layers of additional review by state governments, Indian tribes, and

[2] *See* 16 U.S.C. § 470 *et seq*. An "Undertaking" subject to review under the NHPA is: "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. § 470w(7). Nextel agrees with the Comments filed by Sprint PCS and other in this proceeding that the Commission must take this opportunity to revise its application of the term "Undertaking," and clarify that all tower siting is not a federal Undertaking subject to review.

"interested third parties" to the siting approval process. Just as troubling, the draft leaves entirely open-ended the time frames for such additional review and creates a series of confusing "exemptions to the exemptions" that could, under some circumstances, drag exempted projects back into the review process.

Additional, onerous and unpredictable review procedures like those set forth in the Programmatic Agreement will come at a very high price: they will harm CMRS carriers and consumers because the new requirements will inhibit wireless carriers' ability to build out their networks, increase their service territories and improve their coverage areas. A lengthy, multi-party evaluation process that can disrupt the construction and installation process and provide for virtually open-ended review of proposed tower siting plans is not consistent with this Commission's deliberate and successful choice to foster CMRS competition and growth in the marketplace, as well as its obligation to enhance public safety.

The Commission should either reject the Programmatic Agreement as a whole and start a new, more balanced process of constructing a Programmatic Agreement with continued input from the wireless industry, or at least modify those provisions in the Programmatic Agreement that allow additional unrealistic, unfettered third-party review of CMRS carriers tower siting proposals and which do not inject any time constraints or real due process to ensure appropriate limitations on such review.

## II. THE PROPOSED PROGRAMMATIC AGREEMENT IS OVERLY BURDENSOME, AND UNREASONABLY RESTRICTS CARRIERS' ABILITY TO OFFER UBIQUITOUS WIRELESS COVERAGE, THUS IMPAIRING THE COMMISSION'S CRUCIAL PUBLIC SAFETY MISSION.

### A. Safety is a Top Priority.

One of the Commission's most crucial missions under the Communications Act is to make communications services available to all in order to "promote public safety of life and

property."[3] That mission, while always taken seriously by the Commission, unquestionably has assumed a more central role.[4] Since September 11, 2001, for instance, the FCC has focused its efforts to ensuring that the public health and welfare is adequately protected through reliable, interoperable communications services. Indeed, as one Commissioner recently noted: "[t]he role of public safety is more critical now than ever. From September 11, we have all become painfully aware of the need to be prepared for threats of terrorism. And we still have the kind of emergencies that have always made public safety critical to our country."[5]

Communications providers in general, and wireless carriers in particular, play a vital role in enhancing the public safety and welfare of consumers. Never was this so starkly obvious as during the tragic events of September 11. Reconstruction and rescue efforts in New York City

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[3] 47 U.S.C. § 151.

[4] *See, e.g.*, Reorganization of the Enforcement Bureau and Establishment of the Office of Homeland Security, *Order*, FCC 03-167, ¶ 1 (rel. July 10, 2003) ("[t]o promote more efficient and effective organizational structure and to promote homeland security, the Commission has concluded that the proper dispatch of its business and public interest will best be served by establishing an Office of Homeland Security within the Enforcement Bureau."); Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service, *First Report and Order and Third Notice of Proposed Rulemaking*, 14 FCC Rcd 152, ¶ 1(1998) ("'no responsibility is more fundamental and reflective of the Nation's values than that of its public safety agencies' . . . we recognize this fundamental responsibility, and take additional steps toward achieving our goal of developing a flexible regulatory framework to meet vital current and future public safety communications needs.").

[5] *See* Remarks by Commissioner Kevin J. Martin to the Santa Fe Conference of the Center for Public Utilities Advisory Council, Santa Fe, New Mexico, March 18, 2003.

and Washington D.C. demonstrated that wireless providers play a pivotal role in the Commission's overall public safety disaster recovery planning process.[6]

The CMRS industry has remained committed to furthering public safety, including working to meet Commission benchmarks for enhanced 911 service, priority access[7] and, in many circumstances, providing service for public safety users. Nextel, in particular, continues its efforts to deploy Phase II E911 service across the country. Since October 1, 2002, Nextel has made available for customer purchase an A-GPS handset model that is Phase II location capable and has launched Phase II service that encompasses over 284 Public Safety Answering Points ("PSAPs"). Nextel is working cooperatively with PSAPs throughout the country to deploy E911 as efficiently as possible, and continues to dedicate significant resources to maintain its aggressive roll out schedule of Phase I and Phase II solutions. Nextel has strong ties to the public safety community, and many public safety organizations currently depend upon Nextel to

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[6] *See, e.g.*, INFORMATIONWEEK, January 7, 2002 (stating that "Sept. 11 highlighted the importance of wireless communications in an emergency. At Ground Zero during the height of the rescue efforts, thousands of New York firefighters, police, and emergency workers relied on wireless two-way radios, cell phones, PDAs, and other equipment to communicate with one another. And everyone has heard the heartbreaking stories of Sept. 11 victims using cell phones and pagers to contact loved ones.").

[7] Wireless carriers have signed Priority Access Service agreements with the U.S. Government, allowing designated users with priority access to commercial mobile radio licensed spectrum in times of declared emergency. RCR WIRELESS, May 12, 2003 (noting that "Cingular Wireless L.L.C., AT&T Wireless Services Inc. and Nextel Communications Inc. likely will come on board [to provide priority access service] in about a year."); COMM. DAILY, March 20, 2003 (noting that the National Communications System "expects to have AT&T Wireless join T-Mobile USA in providing wireless priority access service 'later this year.'"); RCR WIRELESS NEWS, April 28, 2003 (observing that "T-Mobile USA Inc. and the National Communications System are expanding the wireless priority system to areas of the northeastern and midwestern United States and Hawaii.").

provide interoperability among disparate police, fire and other first responder radios, both as a primary communications tool and/or as a backup to their existing networks.

All consumers, including public safety users, continue to demand increased coverage and increased functionality in their networks. In response to these demands, Nextel also continues to expand its network and coverage areas. Critically, the delivery of every wireless service and product depends upon the ready availability of basic network infrastructure. One of the more significant capital and resource intensive aspects of wireless infrastructure is communications towers and antenna sites. *Simply put, if the process to site new towers becomes more expensive and unpredictable, it will compromise the ability of carriers to serve their existing and new customers, as well as the potential expansion of their services into secondary markets and rural areas*.

### B. The Public Welfare Demands a Predictable, Reasonable Streamlined Tower Siting Process.

Having public safety as a core public interest mission, the Commission has a basic responsibility to consider the likely effects of its proposals on the public safety. Having wireless services broadly and ubiquitously available cannot help but to advance public safety. Indeed, efficient cell site planning, construction and implementation of a fully functional *nationwide* wireless network for voice and data service is integral to CMRS providers' ability to provide enhanced emergency response and other public safety services. As seen through this filter, the Programmatic Agreement lacks simple and predictable procedures for tower construction.

In the past, the Commission has recognized the importance of simple, streamlined regulation and the need for carrier flexibility as a cornerstone to wireless service and network expansion. While cellular licensing, for example, started with burdensome site-by-site regulatory oversight and Commission approval, with the advent of Personal Communications

Service, the Commission moved away from this process in favor of a far more streamlined process of licensing spectrum on a geographic-area basis, and allowed carriers to build and operate towers *without any prior approval* beyond a spectrum license, excepting only those sites where an Environmental Assessment was necessary.[8] This process of moving from site-by-site to wide-area licensing was repeated in the 800 MHz band, where Nextel operates its nationwide network, as the Commission adopted similar wide-area geographic licensing rules in the band.[9]

Even more recently the Commission has realized the benefits of moving away from site specific licensing to wide-area networks to allow these pro-consumer, pro-safety developments.[10] According to the Commission "[o]ur experience has been that wide-area licensing (as opposed to

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[8] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700, ¶ 1 (1993). (adopting licensing rules, technical standards and spectrum allocations for PCS that "will provide licensees and developers of unlicensed equipment *the maximum degree of flexibility* to introduce a wide variety of new and innovative telecommunications services and equipment."). Pursuant to Section 1.1307 of the rules, a licensee, applicant or tower owner must prepare an Environmental Assessment with respect to the construction of facilities that may significantly affect the environment in any of several specified ways. 47 C.F.R. § 1.1307.

[9] *See, e.g.*, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice Of Proposed Rule Making*, 11 FCC Rcd 1463, ¶ 13 (1995) (concluding that "a portion of 800 MHz SMR spectrum should be designated for wide-area licensing. Notably, the commenters in the CMRS proceeding contended that wide-area SMR systems need contiguous spectrum to obtain flexibility to implement advanced technologies and thereby compete effectively with other CMRS providers, such as cellular and broadband PCS systems.").

[10] *See, e.g.*, Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al*., *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003).

site-by-site licensing) affords licensees substantial flexibility to respond to market demand and may result in significant improvements in spectrum utilization."[11]

The Commission has continually acknowledged the importance of encouraging CMRS infrastructure investment. In its implementation of the 1993 Balanced Budget Act, for example, the Commission noted that the "continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. *It thus is essential that our policies promote robust investment in mobile services*."[12] The Commission sought to "promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services rather than as a burden standing in the way of entrepreneurial opportunities -- *and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.*"[13]

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[11] *Id*. at ¶ 62. The lengthy and multi-party evaluation process outlined in the proposed Programmatic Agreement is also contrary to the Commission's determination to exercise jurisdiction over radio frequency issues, and to prohibit local zoning authorities from conditioning construction and use permits on any requirement to eliminate or remedy RF interference. *See, e.g.,* Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, *Memorandum Opinion and Order*, WT Docket No. 02-100, DA 03-2196 (rel. July 7, 2003) ("*Anne Arundel Order*").

[12] *See* Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, ¶ 22 (1994) (emphasis added).

[13] *Id*. *See also* COMM. DAILY, November 18, 2002 (quoting Deputy Director of the Critical Infrastructure Assurance Office: "[P]ersonal mobility is so highly prized by the individual and by first responders that [the] government sees [a] high priority in making sure wireless infrastructure is protected adequately.").

The Commission's "predictable regulatory environment" typically has focused on "de-regulating" wireless carriers and their practices: "A market-based approach rather than regulatory mandate[s] [is necessary] to ensure continuity of nationwide wireless operations."[14] Indeed, it has long been the case that "as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.'"[15] Reliance on market forces in the regulation of wireless carriers has resulted in significant benefits for consumers. Very recently, the Commission reaffirmed in its *Eighth Annual CMRS Competition Report* that allowing the marketplace rather than regulation to govern wireless service has been a great competitive success, stating that "the CMRS industry [has] continued to experience increased service availability, lower prices for consumers, innovation, and a wider variety of service offerings."[16]

The deregulatory regime under which CMRS carriers have been operating for the last decade is critical to the efficiency and continued growth of CMRS carrier operations and CMRS carriers have come to rely on the Commission's deregulatory policies in all aspects of their business. Contrary to this very positive policy trend, *the proposed Programmatic Agreement, in general, creates a complex and unduly burdensome review process for the construction of cell*

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[14] COMM. DAILY, November 18, 2002.

[15] Southwestern Bell Mobile System Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order*, 14 FCC Rcd 19898 at ¶ 9 (1999) (citation omitted).

[16] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eighth Report*, WT Docket 02-379, FCC 03-150 at ¶ 17 (rel. July 14, 2003); *see also id.* at ¶ 48 (finding a "high level of competition for mobile telephone customers").

*towers and "other Commission Undertakings."* Although intended to streamline and tailor the Section 106 review process for the construction of facilities on or near historic properties,[17] in actuality, the Programmatic Agreement sets forth a complicated series of rules and processes to: (1) determine which "Undertakings" fall within the provisions of the Programmatic Agreement process; (2) allow for an entirely separate and additional Indian tribe consultation and approval process; (3) engage public participation outside of the traditional zoning process; and (4) identify, evaluate and assess the effects of a proposed facility.

This approach will undoubtedly delay wireless build-out and, in turn, delay service to consumers in rural and other high-cost areas, delay or prevent the completion of 911 calls, stymie wireless carrier efforts to provide service in current dead zones, and thus adversely affect overall public welfare. Allowing Indian tribes, SHPOs and the general public to have an unfettered, nearly unstructured say (or *de facto* veto) in wireless carrier infrastructure development is thus contrary to the Commission's policy to encouraging competitive wireless carriers in their service buildouts by removing, rather than creating, new and confusing regulatory constraints.

## III. IN ADDITION TO IGNORING THE COMMISSION'S PUBLIC SAFETY MISSION, THE PROPOSED PROGRAMMATIC AGREEMENT IS CONTRARY TO THE PUBLIC INTEREST.

The public interest demands ubiquitous wireless service on a virtually "nationwide" basis. State regulators and the Commission are focusing more and more on measuring and assessing wireless carrier coverage and service quality. The Commission has acknowledged that

[17] *See* NPRM (Separate Statement of Chairman Powell). According to the Chairman, the "proposed agreement seeks to clarify the regulatory muddle and delay that has beset many tower-construction proposals by defining key terms, establishing public-participation standards and describing how to submit projects to State Historic Preservation Officers."

"'[b]ecause of national advertising and the Internet, consumers all over the country are educated about nationwide rate plans and services enabled by digital technology and the prices of wireless handsets. No matter where they live, *customers expect and demand the diversity of services at competitive rates.*'"[18] Indeed, according to the Commission "[a]mong the major carriers, achieving a national presence and a nationwide infrastructure *are perceived as necessary* to respond to consumer demands for seamless service at reasonable prices."[19]

The pressure on wireless carriers to improve constantly their service quality and coverage areas has been increasing at both the state and federal levels. Federal and state service quality initiatives and "consumer bill of rights" proposals demonstrate the pressures facing wireless carriers to expand and improve upon their *current* services. Senator Charles Schumer (D-NY), for instance, has been a critic of the wireless industry, charging poor service quality, and has introduced a "cellphone user bill of rights" (S-1216) that would require the industry to publicize dead zones. In addition, a recent Report from the General Accounting Office has urged the FCC to "include call quality in its mandated annual report analyzing whether there is effective competition in the market for mobile phone services."[20] Further, the proposed California "Bill of

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[18] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Seventh Report*, 17 FCC Rcd 12985, 13024 (2002) (emphasis added) (citation omitted).

[19] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Fifth Report*, 15 FCC Rcd 17660, 17734 (2000) (emphasis added).

[20] *FCC Should Include Call Quality in Its Annual Report on Competition in Mobile Phone Services,* Report to the Honorable Anthony D. Weiner, House of Representatives, April 2003.

Rights" would require CMRS carriers to provide detailed cell phone coverage maps depicting areas where there are holes in cell phone reception.[21]

State and federal initiatives to regulate these aspects of wireless carrier operations will not come cheap. Indeed, a study of the initial California Bill of Rights proposal alone, estimated that implementing the rules could cost the wireless industry over $925 million in annual compliance costs and more than $475 million in one-time costs.[22] These costs are in addition to those already faced by the wireless industry for federally mandated universal service, Telecommunications Relay Service payment requirements, and the costs to implement changes to their networks to provide E911, telephone number pooling and telephone number portability.

Long-drawn-out and unpredictable tower siting procedures like those in the Programmatic Agreement will harm CMRS consumers because they inhibit wireless carriers' ability to build out their networks, expand their service area and enhance their coverage in places that need new towers to relieve congestion. State and local governments, as well as other interested parties, are already provided with an opportunity to comment on and review tower siting proposals. Indeed, local governments have the right and the duty to consider legitimate land use concerns in acting on requests to site wireless facilities.[23]

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[21] *See* Draft Rules Governing Telecommunications Consumer Protection, *available at* http://www.cpuc.ca.gov/static/industry/telco/billofrights/index.htm.

[22] SAN JOSE MERCURY NEWS, March 16, 2003.

[23] The 1996 Act preserves the authority of State and local governments over the placement, construction, and modification of personal wireless facilities -- land use issues that traditionally have been vested within the States' jurisdiction. 47 U.S.C. § 332(c)(7)(B).

The Programmatic Agreement, as it now stands, provides for yet another layer of review onto the local zoning process. Absent definite time frames for Commission, state and tribal review, the Programmatic Agreement will make the currently troublesome and sometimes unpredictable siting situation far worse. Nextel urges the Commission to move cautiously -- adopting a series of vague and standardless processes will do nothing but further complicate the cell and tower siting process and make it more difficult *and more expensive* for carriers to expand and improve upon their existing networks.

## IV. THE PARTICULAR PROCEDURES OUTLINED IN THE PROGRAMMATIC AGREEMENT ARE UNNECESSARILY COMPLICATED AND DO NOT STREAMLINE THE TOWER SITING REVIEW PROCESS.

As a whole, the proposed Programmatic Agreement does not reflect the combined consensus of all interested parties. What is missing from the tower siting procedures in the Programmatic Agreement is any taking into account of the interests of CMRS providers and other stakeholders in the tower or the broader communications industry.

While the Commission ought to strike the entire agreement and restart the process, Nextel recognizes the Commission's sense of urgency to adopt some procedures. If the highly flawed Programmatic Agreement is the Commission's chosen vehicle, then Nextel urges the Commission to modify its most egregious aspects. Fundamentally, the more specific and predictable procedures are for building on or near historic properties the better it is for all concerned participants.

### A. The "Undertaking Exclusions" List Is Confusing and Too Narrowly Defined.

A significant provision in the Programmatic Agreement is an "Exclusions List" which exempts certain tower siting projects from the Section 106 review process. Although potentially useful in concept, the Exclusions List in the draft Programmatic Agreement is

fraught with confusing and ambiguous language. As CTIA, PCIA and NAB recognize, the proposed exclusions are "so diluted or convoluted as to render them ineffective as streamlining measures."[24]

Critically, the proposed exclusion list does not correspond to the lists that were originally negotiated among *all* interested parties, which contained much more extensive listings of "Undertaking Exclusions." Those original lists – which contained much simpler and straight-forward listings of the Undertakings excluded from the Section 106 review by the SHPOs, Commission or the Council – are the ones that should be considered by the Commission and adopted under the Programmatic Agreement.

1. The "Exemptions for the Exclusions" Must be More Plainly Defined.

Section III.A.5 excludes from the Programmatic Agreement the construction of a facility 400 feet or less in overall height above ground level located in or within 200 feet of certain government rights-of-ways. The provision, however, "excludes from the exclusion" those facilities where: (1) the existing highway, railway line, or communications structure is included in the National Register and the setting or other visual element is identified as a character-defining feature of eligibility on the National Register nomination; (2) the proposed Facility lies within 200 feet of any other structure that is 45 years or older; or (3) the proposed Facility lies within 3/4 mile of and is visible from a unit of the National Park System that is listed or eligible for listing in the National Register, or a National Historic Landmark.[25] As CTIA correctly notes, the proposed language that directly or indirectly results in an "exemption to the exclusion"

[24] *See Programmatic Agreement* at III, note 1 (NPRM Appendix A-7).

[25] *See id.* at III.A.5 (NPRM Appendix A-9).

throws everything into a lengthy Section 106 review process, and plainly makes little sense.[26] The result is the loss of any predictability in the tower siting process.

2. The Conference "Opt-In" Proposal Must be Rejected.

In addition to the loss of predictability, the opt-out provision to the Exclusions List proposed by The National Conference of State Historic Preservation Officers would involve state-by-state determinations of what areas are and are not excluded, and would increase considerably the length of the review process.

The Conference has proposed a modification to Section III.A.5 that would allow individual SHPOs to "opt out" of the exclusion contained therein where historic properties are likely to be present in the areas listed. SHPO opt-out would be contingent on agreement to consult with Applicants and engage in good faith efforts to identify alternate locations for the location of communications facilities.[27] Such an opt-out provision should not be entertained by the Commission, "because it reverts back to addressing key exclusions on a state-by-state basis with no guarantees that the parties will reach consensus." In addition, "the proposed opt-out provision would result in an additional 12-18 month negotiation process with each state that chooses to opt out in addition to what has already been a lengthy process, *i.e.*, two years."[28]

3. The Navajo Nation's Proposed Language Adds Yet Another Layer of Review to an Already Time-Consuming Process.

Pursuant to the Navajo Nation's proposal, an applicant for construction authority, prior to commencing construction of any Facility *excluded* from Section 106 review, would *still* be

[26] *Id.* at III.A.5, note 5 (NPRM Appendix A-9).

[27] *Id.*

[28] *Id.* (citing CTIA's concerns).

required to notify any Indian tribe with aboriginal and/or historic associations to the area in which the Undertaking is to occur and provide the tribe a "reasonable opportunity" to indicate that the Undertaking may adversely affect a Historic Property of traditional religious or cultural importance to that tribe.[29]

As PCIA recognizes, "an exclusion that includes a tribal notice requirement may be tantamount to no exclusion at all."[30] Moreover, the "Nationwide Programmatic Agreement is not the appropriate vehicle to address the notice issue, but that the Commission in consultation with Indian tribes should develop agency procedures with respect to tribal consultation."[31] Similarly, the Navajo Nation's proposed language provides additional and undefined notice requirements, allowing the tribes a "reasonable" opportunity to voice their concerns. No explanation is given as to what the Commission would consider a "reasonable" opportunity, what concerns expressed by the tribe would be considered valid, or under what type of time frame, if any, the tribe should be given to express its views.

Plainly, the proposal provides Indian tribes with the ability to prolong, if not prevent altogether, any construction process that they view as "adversely affecting" Historic Property. Such an-open ended plan has the potential to block any tower construction proposal in its tracks and should be rejected by the Commission.

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[29] *Id.* at III.B (NPRM Appendix A-10).

[30] *Id.*

[31] *Id.*

### B. The Proposals for Indian Tribe Consultation and Participation in the Evaluation Process are Overly Broad and Do Not Provide Any Time Frames Under Which the Indian Tribe Must Act.

In addition to the notice provision proposed by the Navajo Nation, the draft Programmatic Agreement contains two alternative proposals for the participation and consultation of Indian tribes and Native Hawaiian Organizations in the Undertaking review process. Specifically, Alternative A -- Section IV.B. provides that "[c]onsistent with their right to government-to-government consultation, tribal authorities may request Commission consultation on any or all matters at any time, including when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO."[32] Alternative B, on the other hand, requires that the Commission "engage in direct and meaningful consultation with an Indian tribe or NHO when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO."[33]

A critical flaw in both of proposals is the absence of *any* timeframe for tribal review. Indeed, there are *no time parameters or dates for action specified for either alternative.* Pursuant to Alternative A, for instance, an Applicant "must ensure that each identified Indian tribe or NHO has a reasonable opportunity to respond to its communication." And while it specifies that "[o]rdinarily, 30 days from the time the relevant tribal representative may reasonably be expected to have received an inquiry shall be considered a reasonable time," the provision further states

[32] *Id.* at IV.B (NPRM Appendix A-11).

[33] *Id*. at IV.B (NPRM Appendix A-15).

that "[s]hould the tribe request additional time to respond, the Applicant shall afford additional time as reasonable under the circumstances."[34]

Such an open-ended consultation process leaves wireless carriers at the mercy of third-party Indian tribes that are under no obligation to complete the process in a timely manner (if at all). Thus, even if the wireless carrier determines that it falls within one of the specified exclusions, it may still be required to seek tribal approval, which could take months, if not years, to complete. A provision that provides Indian tribes with the ability to stall the tower siting process indefinitely is contrary to the stated purpose of the draft Programmatic Agreement, which "is intended to tailor the Section 106 review in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission Undertakings,"[35] and should be wholly rejected by the Commission.

### C. The Programmatic Agreement Would Provide the States and the General Public with the Ability to Stall Review of Any Proposed Section 106 Construction.

In addition to providing Indian tribes and Native Hawaiian Organizations with unfettered discretion to delay a planned construction project indefinitely, the draft Programmatic Agreement appears to provide individual *states* with similar discretion. Pursuant to Section V, for instance, prior to the time the CMRS carrier submits its planned construction project for review to the appropriate SHPO/THPO, the Programmatic Agreement requires the carrier or Applicant to provide the local government and the general public with written notification of the planned "Undertaking." Upon review of the Undertaking, such local government or other

[34] *Id.* at IV.F (NPRM Appendix A-12).

[35] NPRM at ¶ 1.

interested parties may become "consultants" in the review process and submit comments on the proposed project.[36]

*In addition to providing local governments with an additional regulatory layer over CMRS tower and cell construction beyond the zoning process*, this provision adds yet another to the "mix" of reviewing entities and could potentially permit states to block the proposed construction. No time frames are provided for such state examination or for the submission of comments by the state. As such the states or other interested parties opposed to the proposed Undertaking could presumably hold up the process indefinitely by submitting comments at any stage in the review process and by actively campaigning against the planned tower site. Indeed, pursuant to Section V.F. Applicants are "encouraged" to grant "consulting status" to any interested party with an economic or legal interest in the Undertaking. Such consulting parties must be provided with, among other things, an "opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, the Commission."[37] And, if such status is denied, the aggrieved party may petition the Commission for review of such denial. Such open-ended review by consulting parties, without any defined parameters, offers states and other interested parties unfettered discretion to hold up the tower siting review process indefinitely. The Commission must ensure that the local governments and other interested parties do not have this ability foreclose a planned tower construction by essentially "filibustering" the process.

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[36] *See Programmatic Agreement* at V.A-C (NPRM Appendix A-15-16).

[37] *Id*. at V.F (NPRM Appendix A-17).

### D. The Process for Commission Review Contains No Timelines for Resolution.

Throughout the review process, after a carrier or Applicant has submitted a construction project to the SHPO/THPO for review, the review procedures provide the Applicant with the opportunity to seek Commission review if the Applicant and the SHPO/THPO disagree with the SHPO/THPO's findings.[38] As is the case with the state and tribal review processes, however, no timeframes for Commission resolution are specified in the draft Programmatic Agreement, nor does the draft outline the procedures for Commission resolution. The failure to create any predictable boundaries on Commission review is a critical flaw that must be addressed.[39]

***A 30 day timeframe for review of any proposed Undertaking is critical for all parties, including the Commission, involved in the review process***. Absent such a specified timeframe for Commission and third-party decision-making, the Programmatic Agreement will fail to streamline the construction review process and will place CMRS carriers and other Applicants wishing to expand or improve their networks at the mercy of third-parties who have the potential to delay the review process indefinitely. At some point in the siting process, it is better to have certainty, even if the result is not what the carrier/SHPO/THPO or third-party might desire in a particular instance.

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[38] *See, e.g.*, *id.* at VII.B.4 (NPRM Appendix A-21) (noting that if the SHPO/THPO and Applicant disagree over the Applicant's determination of "no Historic Properties affected," the Applicant "may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.").

[39] *See, e.g.*, *Anne Arundel Order* (taking over a year to resolve a dispute between Anne Arundel County and two CMRS providers over *ultra vires* construction ordinances).

## V. CONCLUSION.

Any version of a Programmatic Agreement adopted by the Commission must reflect not only the interests of governmental and quasi-governmental groups, but also the interests of other stakeholders in the tower and communications industries. To deliver on the promises it has made to Congress and the American people about Homeland Security and enhancement of public safety, as well as to promote ubiquitous nationwide communications, the Commission must both balance the needs of all and reflect that balance of interests in a Programmatic Agreement that results in a more predictable and streamlined process for tower siting and construction.

Respectfully submitted,

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